CHIN HWA ENGINEERING DEVELOPMENT CO.

v.

THE STATE GOVERNMENT OF SARAWAK

HIGH COURT, KUCHING
DATO' HAJI ABDUL KADIR BIN SULAIMAN J.
[ORIGINATING SUMMONS NO KG 269 OF 1992(II)]
3 MAY 1994

ARBITRATION: Dispute between parties referred to arbitration - Arbitrator deciding in favour of plaintiff - Defendant refusing to abide by award - Application for enforcement of award - Arbitration Act 1952, s. 27 - Defendant failing to take any steps to have award set aside prior to filing of plaintiff's application - Whether defendant can now seek to show that the arbitrator was acting without jurisdiction - Whether award was irrevocably final and binding on the defendant.

The plaintiff and the defendant referred their dispute to arbitration pursuant to the terms of the contract entered into between them. The arbitrator published an award in favour of the plaintiff and the defendant agreed to pay the sum stipulated in the award. However the defendant subsequently informed the plaintiff that they were disputing the award on the grounds that the arbitrator had exceeded his jurisdiction or had acted without jurisdiction. This is the plaintiff's application for enforcement of the award pursuant to s. 27 of the Arbitration Act 1952 (the Act).

Held:

[1] The defendant is precluded from questioning the award made by the arbitrator as prior to the application by the plaintiff pursuant to s. 27 of the Act, the defendant did nothing to question the award. The defendant has not taken any step to have the award set aside under s. 24(2) of the Act leave alone within the time limit allowed by O. 69 r. 4(1) of the Rules of the High Court 1980 (RHC 1980). The defendant has also failed to exercise its right given by O. 69 r. 2(3) RHC 1980 to apply for a declaration that the award made is not binding on it on the ground that it was made without jurisdiction.

[2] The contract between the plaintiff and the defendant is not in dispute and there is no real ground for doubting the validity of the award. What is really in dispute is the jurisdiction of the arbitrator acting pursuant to a valid arbitration clause in the contract. In the circumstances, to raise the question of jurisdiction of the arbitrator in the present proceedings when the defendant had slept over its rights under the Act and the RHC 1980 would be to fly in the face of the provisions of the Act and the RHC 1980.

[3] The defendant, by initially agreeing to pay the award and subsequently challenging the jurisdiction of the arbitrator was not behaving in an equitable manner. In the circumstances of the case, the award made by the arbitrator, in accordance with the terms of the contract between the plaintiff and the defendant, was final and binding on the defendant.

[Plaintiff's application for leave to enforce award allowed].

Cases referred to:
Mohamed Abdullah Tpe Abdul Majeed v. Habib Mohamed [1986] 1 MLJ 526 ***(dist)***
Middlemiss & Gould v. Hartlepool Corporation [1973] 1 All ER 172 ***(refd)***

Legislation referred to:
Arbitration Act 1952, ss. 17, 24(2), 27
Rules of the High Court 1980, O. 69 rr. 2(3), 4(1)
Arbitration Act, s. 26 (UK)

Other sources referred to:
Administrative Law, Sir William Wade, 6th Edn. p. 41

For the plaintiff - Matthew Chan; M/s Chan, Kho & Loy
For the defendant - J.C. Fong, State AG's Chambers

JUDGMENT

Haji Abdul Kadir bin Sulaiman J:
On 28 June 1993, I granted leave to the plaintiff on its application made by originating summons to enforce the award of the arbitrator dated 29 May 1992 in the same manner as a judgment or order to the same effect pursuant to the provisions of s. 27 of the Arbitration Act 1952 (hereinafter referred to as "the Act"). The defendant dissatisfied with the said decision applied for the matter to be adjourned to open Court for further argument.

The award arose out of the dispute referred to the arbitrator by the plaintiff and the defendant pursuant to clause 43 of the contract entered into between the plaintiff and the defendant. The plaintiff, a building and civil engineering

contractor registered with the State Tenders Board, Sarawak was awarded a contract by the defendant in respect of Bakau Piling for the embankments of proposed Sungai Santubong Bridge along the proposed Kuching/Santubong/ Teluk Bandung Road, Sarawak. The plaintiff took possession of the site in early December 1985 and piling works began at the end of the month. During the course of construction of the works, disputes arose between the plaintiff and the defendant over the size of the bakau piles specified in the contract which were not provided by the plaintiff. On 18 March 1986 the defendant issued a letter to the plaintiff suspending the plaintiff "from future tendering until further notice". The letter is exhibited as "B" to the affidavit in reply of the defendant affirmed on 11 January 1993. Treating the defendants as having committed a breach of the contract and evinced an intention not to continue with the contract, the plaintiff abandoned the site on 27 March 1986. On 24 January 1990 the plaintiff gave notice to the defendant to have the dispute between them referred to arbitration pursuant to the provisions contained in the aforesaid clause 43 for the alleged repudiation of the contract by the defendant. The said notice is exhibited as "A" to the same affidavit of the defendant. Both parties agreed on an arbitrator. In the end an award was handed down to the following effect in favour of the plaintiff.

(1) Damages for breach of contract and or repudiation pursuant to paragraph 29 of the points of claim in the sum of RM136,306.90;
(2) Special damages for breach of contracts pursuant to paragraph 31 of the points of claim in the sum of RM32,343;
(3) General damages for wrongful suspension of its tender registration pursuant to paragraph 32 of the points of claim in the sum of RM552,584;
(4) interest on (1) and (2) at the rate of 8% p.a. from date of the plaintiff's reference to arbitration i.e. 24 January 1990 till final payment and on (3) at the same rate from 25 April 1990 till full payment; and
(5) Costs of the award (including arbitrator's fee, expenses, hiring room for the hearing) and costs of reference (including costs properly incurred by the plaintiff in the course of the arbitration).

As regards item (5) above, both parties corresponded with one another and by a letter from the solicitors for the plaintiff dated 4 July 1992 exhibited as VNH6 to the affidavit in support of the plaintiff affirmed on 9 November 1992, the plaintiff accepted the counter offer of the defendant for a global sum of RM70,400 as costs of both the award and the reference. Then by a letter dated 15 July 1992 exhibited as VNH7 to the same affidavit of the plaintiff, the solicitors for the defendant informed the plaintiff that necessary steps are being taken to effect settlement of the arbitrator's award of 29 May 1992 aforesaid. However, by a letter dated 11 September 1992 the defendant by exhibit "VNH 8" to the same affidavit of the plaintiff, took a sudden about-turn by informing the plaintiff as follows:

> 11 September 1992
>
> M/s Matthew T K Chan & Co.
> Advocates
> Rm 202, 2nd Floor
> Wisma Bukit Mata Kuching
> Jalan Tunku Abdul Rahman
> 93100 KUCHING
>
> Dear Sirs
>
> re: Contract for Bakau Piling for the embankments of proposed Sungai Santubong Bridge along the proposed Kuching/Santubong/Teluk Bandung Road, 1st Division
> -Arbitration Proceedings
>
> 1. I refer to your letter dated 7 September 1992 requesting for payment of the Award by the Arbitrator.
> 2. The Arbitrator had exceeded his jurisdiction or acted without jurisdiction in making the Award.
> 3. The Award is, therefore, void.
> 4. Any action taken by your clients to enforce the Award will be strongly resisted.
>
> "Bersatu Berusaha Berbakti"
>
> (Francis Johen Ak Adam)
> Senior Legal Officer
> for State Attorney-General
> Sarawak
>
> cc State Financial Secretary
> Sarawak

With the refusal of the defendant to be bound by the award, this application was filed by the plaintiff. In chambers, after hearing submissions by both sides and considering the affidavit evidence filed, I allowed the application of the

plaintiff by ordering the defendant to pay to the plaintiff as follows:

(1) Damages for breach of contract and or repudiation pursuant to paragraph 29 of the points of claim in the sum of RM136,306.90;
(2) Special damages for breach of contracts pursuant to paragraph 31 of the points of claim in the sum of RM32,343;
(3) General damages for wrongful suspension of its tender registration pursuant to paragraph 32 of the points of claim in the sum of RM552,584;
(4) interest on (1) and (2) at the rate of 8% p.a. from date of the plaintiff's reference to arbitration i.e. 24 January 1990 till final payment and on (3) at the same rate from 25 April 1990 till full payment;
(5) Costs of the award (including arbitrator's fee, expenses, hiring room for the hearing) and costs of reference (including costs properly incurred by the plaintiff in the course of the arbitration); in the sum of RM70,400; and
(6) Costs of this application to be taxed, unless agreed.

The basis of my decision in chambers is that the defendant is precluded from questioning the award so made by the arbitrator as prior to the application by the plaintiff pursuant to s. 27 of the Act, the defendant did nothing to question the award. The defendant has not taken any step to have the award set aside under s. 24(2) of the Act leave alone within the time limit allowed by O. 69 r. 4(1) of the Rules of the High Court 1980 (hereinafter referred to as "the RHC") i.e. within 6 weeks after the award has been made and published to the parties. The defendant also has failed to exercise its right given by O. 69 r. 2(3) of the RHC to apply for a declaration that the award made is not binding on it on the ground that it was made without jurisdiction. In the circumstances of the case the award becomes final and binding on the defendant. I have considered the submission put forward by the learned Counsel for the defendant that notwithstanding the non-action of the defendant as provided for by O. 69 of the RHC, the issue of the invalidity of the award could still be raised during the proceedings to enforce the award. In other words, the defendant cannot be precluded from raising the issue in the present application of the plaintiff. In support of his proposition, the learned Counsel cited the case of *Mohamed Abdullah Tpe Abdul Majeed v. Habib Mohamed* [1986] 1 MLJ 526 where Peh Swee Chin J. (as he then was) held that the validity of an award of an arbitration can still be questioned at the stage of an application to enforce the award. This is so because, according to the learned Judge, the point of illegality affecting the validity of an award is a recognised ground for contesting the application for leave to enforce such an award. Even if it were not pleaded before the arbitrator or the High Court it would be the duty of the Court to take a point of illegality even if the parties before it may not take it when this point clearly arises on the evidence. In that case, both the plaintiff and the defendant became partners of a restaurant by a written agreement allowing each of the parties to have exclusive management and control of the restaurant in alternate years and be entitled to keep for himself exclusively the profits and be liable for any loss of the said restaurant while under his exclusive control and management. The partnership business was on land held under a temporary occupation licence (T.O.L.) and carried on under a stall licence. Both these licences were personal to the defendant and non-transferable. For some reason, the defendant failed to keep to the partnership agreement and refused to hand over the said business to the plaintiff in accordance with the agreement. Pursuant to the arbitration clause in the agreement the dispute was referred to the arbitrator. The arbitrator delivered his award vindicating the rights of the plaintiff under the agreement. The plaintiff sought leave of the Court to enforce the award of the arbitrator under s. 27 of the Act. In the proceedings before the learned Judge, the submission for the defendant was that the partnership agreement was unenforceable for having been tainted with illegality owing to non-transferability of the T.O.L. and the stall licence. Having gone through the issue in the trial, the learned Judge however, was of the opinion that the substance of the partnership agreement did not amount to a transfer of such rights under the T.O.L. or the stall licence but would merely amount to permission for use of such rights under both licences and he accordingly could not accept the submission of learned Counsel for the defendant on this point of illegality. To my mind, the case cited can easily be distinguished on the facts because the issue before the Court in that case was over the illegality of the contract which contained the arbitration clause. If the

defendant there succeeds in his argument, it makes the contract *void ab initio* and if it were so, then the arbitration clause contained therein cannot be operative for the clause itself would be void which is based on a void contract. But in our present case, the contract between the plaintiff and the defendant is not in dispute. What is really in dispute is over the jurisdiction of the arbitrator acting pursuant to a valid arbitration clause in the contract. Therefore, in my view, to raise the question of jurisdiction of the arbitrator in the present proceedings when the defendant had slept over its rights under the Act and the RHC would be to fly in the face of the provisions of the Act and the RHC. So, in chambers, I held that the award as it stands is final and binding on the parties and the defendant was therefore precluded from raising the issue in the proceedings commenced by the plaintiff for enforcement under s. 27 of the Act. I found support in *Middlemiss & Gould v. Hartlepool Corporation* [1973] 1 All ER 172, where the Court of Appeal of England laid down the rule that once an award has been made and the time limit for challenging it has expired, the award becomes irrevocably final and binding and it can therefore, be entered as a judgment and enforced accordingly. Lord Denning in that case stated that the summary method under s. 26 of the English Act, which is in *pari materia* with our s. 27 of the Act, is to be used in nearly all cases and leave should be given to enforce the award as a judgment unless there is a real ground for doubting the validity of the award. So, the mere fact that there was a point of law which one side or the other thought had been wrongly decided did not make the award invalid. In this case I find that there is no real ground for doubting the validity of the award. Clause 43 of the contract talks of any dispute or difference as to any matter or thing of whatsoever nature arising under the contract or in connection with the contract is the subject of arbitration proceedings. Therefore, suspending the plaintiff "from future tendering until further notice" resulting in the plaintiff being unable to procure contracts from March 1986 to April 1990 as found by the arbitrator is a dispute over a matter in connection with the contract entered into between the plaintiff and the defendant. The award being final and binding on the parties, it is for the defendant to honour it. Since the defendant had failed to do so, it is proper for the plaintiff to institute this proceeding for leave to enforce it. Having so held, I found that it is no longer necessary for me to determine whether or not the arbitrator has jurisdiction or lacked the jurisdiction to decide on the dispute referred to him by the plaintiff and the defendant pursuant to the said clause 43 of the contract and to hand down the award as he did in this case.

In this proceeding in open Court for further argument, the learned Counsel for the defendant by his written submission pointed to my ruling in chambers that since the defendant had failed to take the necessary steps to have the award either set aside or be declared to be not binding on the parties pursuant to O. 69 of the RHC, it is no longer necessary for me to determine whether the jurisdiction or lack of jurisdiction of the arbitrator to decide on the dispute and to hand down the award as he did in this case. The learned Counsel urged upon me to look to see whether or not the arbitrator has jurisdiction for if he did not have the jurisdiction, his award is invalid and illegal and therefore leave to enforce should not be given. The learned Counsel cited a passage from **Administrative Law** by Sir William Wade (6th Edn.) at page 41 thus:

> Any administrative act or order which is *ultra vires* or outside jurisdiction is void in law, i.e. deprived of legal effect. This is because in order to be valid it needs statutory authorisation, and if it is not within the powers given by the Act, it has no legal leg to stand on. The Court will then quash it or declare it to be unlawful or prohibit any action to enforce it.

For my part, I would not stop at that for continuing the paragraph the learned author further states:

> The terminology here depends to some extent on the remedy granted. "Quashing" is used in connection with the remedy of *certiorari*, but in effect it is simply a declaration of nullity. **A declaratory judgment is an alternative remedy with similar effect:** it declares the offending act to be a nullity in law.
> (underline is mine).

This is what O. 69 r. 2(3) of the RHC is all about. If the defendant believes that the award so made was made without jurisdiction, it should have applied to have the award declared by the Court to be not binding on that ground well before the plaintiff filed in this application for enforcement. But it slept over its right and further, gave the plaintiff false hope by issuing VNH7 dated 15 July 1992 after agreeing on a

global sum for costs under item (5) in the sum of RM70,400 and then when pressed for payment, issued VNH8 challenging the jurisdiction of the arbitrator. The defendant is not behaving in an equitable manner in the circumstances. If I were to accede to the requirement of the defendant to open up the matter to look into the question of the jurisdiction of the arbitrator after it had failed to exercise its right under the RHC, I would repeat what I have said in chambers that to raise the question of jurisdiction of the arbitrator in this present proceedings by the plaintiff when the defendant had slept over its rights under the RHC would be to fly in the face of the provisions of O. 69 of the RHC. By clause 43 of the agreement both the plaintiff and the defendant agree to be bound by the award of the arbitrator of their choice and the finality and the binding force of the award and by s. 17 of the Act the award in the light of the provision under clause 43 of the contract is final and binding unless something is done to have it declared as not binding under O. 69 of the RHC. I would reiterate that the case of *Mohamed Abdullah Tpe Abdul Majeed v. Habib Mohamed* [1986] 1 MLJ 526 can easily be distinguished because the contract the parties entered into wherein to be found the arbitration clause is indisputably a valid contract. In the circumstances, I would confirm my decision in chambers that leave is hereby granted to the plaintiff to enforce the said award in the same manner as a judgment or order to the same effect. The defendant is hereby ordered to pay to the plaintiff:

(1) Damages for breach of contract and or repudiation pursuant to paragraph 29 of the points of claim in the sum of RM136,306.90;
(2) Special damages for breach of contracts pursuant to paragraph 31 of the points of claim in the sum of RM32,343;
(3) General damages for wrongful suspension of its tender registration pursuant to paragraph 32 of the points of claim in the sum of RM552,584;
(4) interest on (1) and (2) at the rate of 8% p.a. from date of the plaintiff's reference to arbitration i.e. 24 January 1990 till final payment and on (3) at the same rate from 25 April 1990 till full payment;
(5) Costs of the award (including arbitrator's fee, expenses, hiring room for the hearing) and costs of reference (including costs properly incurred by the plaintiff in the course of the arbitration); in the sum of RM70,400; and
(6) Costs of this application to be taxed, unless agreed.